IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 577 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASHUBHAI DHANABHAI BARAD

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 577 of 2003

MR YOGESH S LAKHANI for Petitioner No. 1

Mr V M Pancholi, APP for Respondent No. 1

NOTICE UNSERVED for Respondent No. 2

MR S V Raju for Mr CHETAN K PANDYA for Respondent No. 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/08/2003

ORAL JUDGEMENT

The petitioner herein has preferred this petition under Article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') for appropriate writ, order or direction for quashing and setting aside the decision taken by the State Government directing reinvestigation of the criminal complaint instituted by the third respondent being CR.I-45/2002 registered before Prabhas Patan police station in Veraval Taluka of Junagadh District in respect of offences said to have been committed at 14.30 hours on 18.3.2002, punishable under sections 307, 326, 34 and 114 of IPC as well as under section 25 of the Arms Act and section 135 of the Bombay Police Act, 1951. The aforesaid FIR was filed on 18.3.2003 by one Jasabhai Lakhabhai Koli of Gorakhmadhi against two unknown persons for the aforesaid offences. During the course of investigation, names of the accused persons were disclosed and accordingly they were arrested. They were charge-sheeted before the learned Judicial Magistrate First Class at Veraval and since the offence in question was exclusively triable by a Court of Sessions, the case was committed to the Court of Sessions at Veraval and it has been registered there as Sessions Case No.85/02. These facts are not very much in dispute.

2. Thereafter the State Government felt that further investigation was necessary and therefore, the State Government decided to go for further investigation and instructed CID Crime, Junagadh unit to undertake further investigation. This fact is also not much in dispute. The petitioner herein states that the above decision has been taken by the State Government in colorable exercise of powers with a view to involve the petitioner and other persons in the said offence, though the petitioner had absolutely no connection with the said offence and his name has not been disclosed at any point of time during the stage of investigation. That therefore, with a view to politically victimise and harass the petitioner, further investigation was directed without authority of law. That the State Government has taken the said decision without the permission or order of the Court concerned and, therefore, the said decision is illegal and consequently the investigation pursuant to the said decision undertaken by the CID Crime, Junagadh unit is illegal. Therefore, the petitioner has preferred this petition with a prayer as aforesaid.

3. On receiving the petition notice was issued and in response to the service of notice, Mr V M Pancholi, learned APP has appeared on behalf of the State. I have

heard Mr N D Nanavati, learned Sr.Advocate appearing with Mr Y S Lakhani, for the petitioner and Mr V M Pancholi, learned APP appearing for the State. Both of them have taken me through the aforesaid FIR at page No.16 and other materials on record.

4. Learned Sr.Advocate appearing on behalf of the petitioner with Mr Y S Lakhani, learned Advocate has heavily assailed on the State Government's decision for further investigation mainly harping on the point that further investigation was directed without the order of the concerned. On the other hand, learned APP as well as the learned Advocate appearing for the contesting respondent both have argued that the permission was obtained and technically speaking, no such permission was required to be obtained and, therefore, the petitioner has no case. It has further been argued by them that the petitioner has no locus to file the petition and, therefore, their prayer is that the petition be dismissed at the admission stage.

5. The facts are undisputed. FIR was filed, charge-sheet was filed and the case was committed to the Sessions Court and thereafter a decision appears to have been taken by the State Government for further investigation in the matter.

6. Further investigation subsequent to the filing of the charge sheet under sub-section (2) of Section 173 of the Code is permissible under sub-section 8 of section 173 of the said Code. The said provision of section 173 (8) of the Code may be reproduced for ready reference:

> "Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

7. The above provision makes it clear that the further investigation can be undertaken subsequent to the filing of charge sheet by the Investigating Officer. The said section does not require that there should be a

sanction or permission from the Court concerned for further investigation into the matter. In short, the law as laid down in section 173 (8) of the said Code does not provide for a sanction or permission of the Court for further investigation into the matter. Therefore, further investigation without the order of the Court concerned cannot be technically treated to be illegal.

8. However, learned Sr.Advocate for the petitioner has relied upon certain decisions in order to argue that even the judicial propriety requires that before further investigation is undertaken, formal permission is obtained from the court concerned. For the said purpose, a decision of the Hon'ble Supreme Court in the case of Ram Lal Narang v. State (Delhi Administration), reported in (1979) 2 SCC 322 was relied upon. There the Hon'ble the Apex Court has discussed the provisions made in Sections 156, 190 and 173 of the old Code of 1898. It has to be taken into account here that the present Code of 1973 has come into force with effect from 1.4.1974. Before the said date the Criminal Procedure Code of 1898 was in force. Admittedly, the said Code did not provide for further investigation and the present sub-section (8) of section 173 of the Code was absent in 1898 Code. In other words, there was no provision or further investigation into the matter after submission of charge sheet and, therefore, following observations were made in para 20 in the said judgment.

> "20. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a Court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interest of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interest of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light."

Even in para 22 following observation has been made:

> "22. As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication, barred the right of the police to further

> investigate after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation."

Therefore, the Hon'ble Apex Court had made it clear that further investigation could be gone into but with a view to maintain judicial discipline and judicial propriety, it would be proper to approach the Magistrate concerned and seek his formal permission for the second investigation. However, the Hon'ble Apex Court has clearly observed that there has been no illegality. Therefore, when sub-section (8) of section 173 of the Code was absent in section 173 of the Code of 1898, then also the the Apex Court clearly laid down that the second investigation or further investigation was permissible but the proper course would be to obtain formal permission for the second investigation from the court concerned. However, the Court further held that even if such permission is not obtained, an act of second investigation would not be illegal. In other words, the second investigation or further investigation would not be treated to be illegal for want of permission or sanction from the Court concerned.

9. So far as the factual aspects in the case on hand are concerned, we can refer to an application dated 21.5.2003 submitted by the Police Inspector, CID Crime, Junagadh addressed to the Addl.Public Prosecutor, Veraval which is placed at page no.58. There it has been mentioned that a charge sheet has been filed on 27.9.2002 being charge sheet No.133/2002 in the aforesaid offence and it has been culminated in Sessions Case No.85/2002. That the matter has been placed at the stage of framing of charge. That the Addl.Director General of Police, CID Crime, Gujarat has passed an order dated 5.5.2003 for

further investigation into the matter and, therefore, the learned Addl.Public Prosecutor should request the Court for further adjournment at the stage of framing of charge. This means that the Police Inspector concerned had informed the Addl.Public Prosecutor, Veraval that a further investigation was ordered in the aforesaid matter after submission of charge-sheet and after the commitment of the case to the Court of Sessions and, therefore, adjournment should be sought at the stage of framing of charge. On the same date i.e. on 21.5.2003, the said Officer also requested the trial court for permission to further interrogate the accused persons in Junagadh jail. There also the said Officer had made it clear in the said application that the Addl.Director General of Police, Gujarat State, Gandhinagar had issued an order for further investigation in the aforesaid offence and, therefore, further interrogation of the accused present in the Junagadh jail was necessary and, therefore, the said permission was sought from the trial court.

10. By the above letter at page no.59, the concerned police officer appears to have informed the Court concerned that further investigation was ordered by the Addl.Director General of Police, Gujarat State, Gandhinagar. The said officer also approached for permission for further interrogation of the accused person in Junagadh jail. Further interrogation of accused persons would be a part and parcel of further investigation also. Therefore, indirectly, the said Officer appears to have prayed for further investigation in the matter. It is required to be seen that so far as the order of further investigation passed by the Addl.Director General of Police is concerned, the said officer has placed the said fact to the notice of the learned Judge incharge of the said Sessions Case.

11. A letter at page No.60 dated 21.5.2003 shows that the learned Addl.Sessions Judge, Veraval did inform the Superintendent of District jail at Junagadh that the Court had permitted the aforesaid police officer to further interrogate the accused persons in the aforesaid Sessions Case and, therefore, the said officer be allowed to undertake further interrogation of the said accused persons in the jail. This means that the learned Judge had granted permission to the said police officer to further interrogate the accused persons in the said matter. Then, we find another letter at page no.61 wherein the said officer had made another application to the said Court stating that there were some representations and applications in the matter that the investigation was not proper, that therefore, the

Government had directed CID, Crime to further investigate the matter and, therefore, the said officer was further investigating the said matter. The said letter also states that further oral and documentary evidence was required to be collected and the remaining accused involved in the offence were required to be arrested. That therefore, time for further investigation may be extended for a further period of one month and charge may not be framed against the accused persons already arrested earlier. By this application, the said police officer seems to have conveyed to the said Court that further investigation was undertaken, further evidence was obtained and remaining accused were required to be arrested. The said police officer, by the said letter also requested for extension of one month's time for further investigation.

12. Then by a letter at page no.63, dated 16.6.2003, the said police officer again told the said Court that three more accused were arrested and their names have been indicated in the application also. It is further stated in the application that the investigation was going on, two more accused persons were required to be arrested and their names have been disclosed and, therefore, extension of time for 14 days' was sought.

13. Now, on going through the said applications, it is clear that the said officer has not prayed for permission for investigation in so many words but instead of seeking permission for further investigation, the said officer has sought extension of time for further investigation.

14. It is well settled that pleadings of mofussil courts are not strictly construed and they are not required to be read rigidly. Liberal construction of such pleadings is an accepted principle since years. In my opinion, even this principle will apply to the facts of the case on hand. It is true that the police officer has not prayed in so many words for permission for further investigation. At the same time, permission has been sought for extension of time further investigation which clearly shows that the concerned police officer did have in his mind the permission for further investigation but the applications were not properly drafted in proper words. It has therefore, to be accepted that the concerned police officer did approach the court concerned for further investigation and, therefore it cannot be said that further investigation has been undertaken by him without the order of the court. Moreover, as said above, even the Hon'ble the Supreme Court has laid down

that technically speaking, permission for further investigation is not necessary under sub-section (8) of section 173. However, the investigating police officer should approach the court concerned for a proper order for further investigation. This is with a view to apprise the court concerned that further investigation is being undertaken by the investigating officer and, therefore, he may not pursue ahead with the trial of the case. This is also in conformity with the system and judicial discipline. The Judge incharge of the case may not be taken by surprise on account of further investigation. This is the reason why further investigation would require a formal order of the court concerned. I am of the view that even if there is no formal order of the Court and even if the investigation proceeds ahead without such a formal order of the court concerned, such investigation cannot be treated to be illegal unless a serious prejudice has been caused to the defence of the accused person and such a prejudice has been shown by the accused persons. This can be dealt with and decided only at the time of trial and not before the trial begins. Therefore, so long as the trial does not commence, it would not be the stage to decide that some prejudice has been caused to the defence of the accused persons. So far as the present petitioner is concerned, he is not connected with the offence at present. His name has not been disclosed as accused but in FIR or in charge-sheet. He apprehends that by some means the name of the petitioner may be disclosed illegally or with some pressure tactics. At present his name has not come on record even in charge-sheet. It would be too early to say anything as to what would happen hereafter. However, if it is found that his name has been placed on records without any material or by means of any pressure tactics, then the said fact can be dealt with and decided in accordance with law on the basis of the materials on record, at appropriate time by an appropriate court. This is not the stage at which this Court may be in a position to deal with the said issue.

15. The case of State of Bihar v. J.A.C. Saldanna, reported in AIR 1980 SC 326 speaks about the jurisdiction of the High Court under Article 226 of the Constitution of India. There it was observed by the Hon'ble Apex Court that ordinarily, the Court should not interfere with the investigation of cognizable offences and it would not be open to give direction to the investigating agency which may amount to direction to close the case. It is further observed that the police officers should

refrain from directly addressing communications to the Court. At the same time, it was also observed that the Government could direct further investigation and entrust further investigation to a particular officer without any infringement of law.

16. In the case of Randhir Singh Rana v. State (Delhi Admn.), reported in (1997) 1 SCC 361, the Hon'ble Apex Court has observed that the order of further investigation under sub-section (8) of section 173 of the Code cannot be passed by the Magistrate suo motu once the cognizance has been taken by him on a police report and after appearance of the accused before the Court.

17. In the case of Union of India v. P P Hinduja, reported in 2003 AIR SCW 3258, following observations have been made:

"20. xxx xxx xxx

....even assuming for the sake of argument that the CBI committed an error or irregularity in submitting the charge-sheet without the approval of CVC, the cognizance taken by the learned Special Judge on the basis of such a charge-sheet could not be set aside nor further proceedings in pursuance thereof could be quashed. The High Court has clearly erred in setting aside the order of the learned Special Judge taking cognizance of the offence and in quashing further proceedings of the case."

"25. The facts and circumstances in which the writ petition was filed, the allegations made and the relief claimed therein would show that the CBI and other Government Agencies had not performed their statutory duty for a very long time to investigate commission of offences as the accused involved were holding high offices. The Single Directive issued by the Government created an embargo on the power of the CBI in registering or investigating cases against officers of the Government, Public Sector Undertakings and Nationalised Banks above a certain level without prior sanction of the designated authority. The proceedings of the case revealed that thee was a complete disinclination on the part of the CBI to proceed with investigation of offences against persons holding high offices even after the matter had been brought to Court. The Court came

to the conclusion that wherever the alleged offender was a powerful person, the CBI remained a silent spectator and practically took no steps to investigate the matter. After examination of the statutory provisions, the Court came to the conclusion that wherever the alleged offender was a powerful person, the CBI remained a silent spectator and practically took no steps to investigate the matter. After examination of the statutory provisions, the Court came to the conclusion that the Single Directive had the effect of restraining the recording of FIR and initiation of investigation, which could not be issued in exercise of power under S.4(1) of the DSPE Act as the powers of investigation are governed by statutory provisions. It was, therefore, considered expedient that the CBI should be insulated from extraneous influence of any kind. The Court also came to the conclusion that in order to establish rule of law, it was necessary that proper investigation is made which is followed by equally proper prosecution. It was in these circumstances that various directions were issued with regard to the functioning of CBI and CVC, Enforcement Directorate, Nodal Agencies and Prosecution Agencies. The entire emphasis in the judgment is that as no one is above the law, the persons holding high offices are not able to escape either on account of intertia or inaction of the CBI to investigate the commission of offence or on account of incomplete or improper investigation or faulty prosecution in Court. A duty has been cast on the CVC to review the progress of all cases moved by the CBI for sanction of prosecution, specially those in which sanction has been delayed or refused. The judgment nowhere says that the CBI will have to take concurrence or sanction from the CVC before filing charge-sheet in Court. No right of any kind has been conferred upon the alleged offender or the accused to approach the CVC or to challenge the action of CBI in submission of charge-sheet in Court on the ground of some purported irregularity in making a report to the CVC regarding progress of investigation."

"26. The view taken by the High Court that as the CBI submitted the charge-sheet without reporting and taking approval or consent from the CVC, the same was illegal and no cognizance could

be taken thereon is, therefore, wholly erroneous and does not at all follow from the judgment."

"27. The accused has absolutely no right to approach the CVC for taking any steps to stop the CBI from either proceeding against him or from launching prosecution against him by filing a charge-sheet. Further, the direction issued do not confer any kind of a right upon the accused to assail the charge-sheet on the ground that the CBI had not reported the progress of investigation to the CVC or had not taken some kind of approval or concurrence from it before submission of the charge-sheet in Court."

18. These observations also show that when the law does not make a consent/permission/leave etc. obligations or mandatory, then in that event, an investigation in absence of such a consent/permission/leave, would not be treated to be illegal on a mere ground that the investigation proceeded in absence of such a consent/permission/leave.

19. In the case of Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P., reported in (1999) 5 SCC 740, it has been laid down that the power of the police to conduct further investigation, after laying the final report is recognised under section 173 (8) of the Code. That even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. It has also been observed that in such a situation, the power of the court to direct the police to conduct further investigation cannot have any inhibition. That there is nothing in section 173 (8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. That as the law does not require it, the Magistrate cannot be burdened with such obligation. This clearly shows that even the accused is not required to be here when a Magistrate directs or permits further investigation under section 173 (8) of the said Code. It is, therefore, clear that so far as the present case is concerned, further investigation has been undertaken under the orders of the Government. The above documents go to show that the Investigating police officer had approached the Court for indirect permission to further investigate the matter as said above.

Technically, such a permission is not needed but as per the observation of the Hon'ble the Supreme Court, the Investigating Police Officer is required to approach the Court for a formal order with a view to apprise the Court that further investigation is undertaken. It is true that as observed above, the application submitted by the Investigating Officer is not properly worded but actually it conveyed the meaning that the Investigating Officer intended to obtain permission from the Court concerned for further investigation under section 173(8) of the Code. In that view of the matter, it cannot be said that further investigation is unauthorised and illegal. Once the further investigation undertaken by the Police Inspector of CID Crime, is not found to be illegal or unauthorised, prima facie, and when prima facie, it is not found that such an investigation is undertaken without the leave of the Court, there is no merit in the present petition and, therefore, this petition is required to be dismissed at the admission stage.

20. For the foregoing reasons, this petition is dismissed at the admission stage. Notice discharged.

[D P Buch, J.]

msp